

No. 12,565

IN THE

United States Court of Appeals  
For the Ninth Circuit

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MILTON H. COX,

*Appellant,*

VS.

LIEUTENANT GENERAL A. C. WEDE-  
MEYER, Commanding Officer of the  
Sixth Army, Presidio, San Fran-  
cisco,

*Appellee.*

Appeal from the United States District Court for the Northern  
District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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## Subject Index

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	Page
I. Jurisdictional statement .....	2
II. Statement of the case .....	3
III. Specification of errors .....	10
IV. Argument .....	11
Point I. The Local Board's classification was arbitrary, capricious beyond its jurisdiction, and a denial of due process, hence its induction order was invalid .....	11
Point II. Cox did not abandon the claim that he was a conscientious objector by his notice of appeal .....	22
Point III. The Appeal Board failed to give adequate consideration to Cox's appeal and to review the whole record and his claim to be a conscientious objector, and denied him due process in other material respects .....	38
Point IV. Cox did not at any time subsequent to the action of the Appeal Board waive the invalidity of the induction order .....	46
Point V. Even if appellant had been legally inducted into the Army and had deserted, his prosecution by a military court is now barred by the Federal Statute of Limitations.....	55
Conclusion .....	62

## Table of Authorities Cited

Cases	Pages
Altieri v. Flint, 142 Fed. (2d) 62 .....	18, 22
Baxley v. United States, 134 Fed. (2d) 998.....	18
Billings v. Truesdell, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed. 917 .....	47, 50, 54
Brown v. Hiatt, 339 U.S. 103, 94 L.Ed. 493, 70 S.Ct. 495..	60
Chih Chung Tung v. United States, 142 Fed. (2d) 919....	24
Collins v. McDonald, 258 U.S. 416, 42 S.Ct. 326, 66 L.Ed. 692 .....	61
Cox v. United States, 332 U.S. 442, 92 L.Ed. 59, 68 S.Ct. 115 .....	14, 20, 31, 32, 33, 43
Cramer v. France, 148 Fed. (2d) 801 .....	25, 40
Dodez v. United States, 154 Fed. (2d) 637.....	31
DuBois Natl. Bank v. Hartford Accident & Indem. Co., 161 Fed. (2d) 132 .....	30
Estep and Smith v. United States, 327 U.S. 113, 90 L.Ed. 567, 66 S.Ct. 423 .....	15, 17, 20, 31, 37, 45, 46, 48
Ex parte Stewart, 47 Fed. Supp. 410 .....	15
Ex parte Yost, 55 Fed. Supp. 768, affd. 157 Fed. (2d) 44	48
Falbo v. United States, 320 U.S. 546, 64 S.Ct. 346, 88 L.Ed. 305 .....	47
Gibson v. United States, 329 U.S. 338, 91 L.Ed. 344.....	54
Givens v. Zerbst, 225 U.S. 11, 41 S.Ct. 227, 65 L.Ed. 475..	49, 61
Grimley v. United States, 137 U.S. 147, 11 S.Ct. 54, 34 L.Ed. 636 .....	60
Harris v. Ross, 146 Fed. (2d) 355 .....	23
In re Davison, 4 Fed. 507 .....	58
In re Herman, 56 Fed. Supp. 733 .....	19, 50, 52
In re Zimmerman, 30 Fed. 176 .....	57
Lawrence v. Yost, 157 Fed. (2d) 44.....	12, 32

# TABLE OF AUTHORITIES CITED

iii

Pages

Mayborn v. Heflebower, 145 Fed. (2d) 864.....	18, 46, 53
McLaughry v. Deming, 186 U.S. 49, 22 S.Ct. 186, 46 L.Ed. 1049 .....	61
McVeigh v. United States, 11 Wells (U.S.) 259, 20 L.Ed. 80	17
Miller v. United States, 169 Fed. (2d) 865.....	20
Missouri State Ins. Co. v. LeFevre, <sup>1</sup> 10 S.W. (2d) 267, 269	31
Niznik v. United States, 173 Fed. (2d) 328, cer. denied, 69 S.Ct. 1169 .....	31, 39
Orlando v. Camden County, 39 A. (2d) 238, 132 N.J.L. 173	30
Reel v. Badt, 53 Fed. Supp. 906 .....	25, 40
Sanborn v. Callan, 148 Fed. (2d) 376.....	18, 46
Serman v. Roberts, 191 S.W. (2d) 824, 209 Ark. 586.....	30
Smith v. United States, 157 Fed. (2d) 176.....	14, 26, 31, 39, 48
Tetreault v. Campbell, 61 A. (2d) 591, 115 Vt. 369.....	30
United States ex rel. Altieri v. Flint, 54 Fed. Supp. 889, affd. 142 Fed. (2d) 62 .....	22, 24, 34, 35
United States ex rel. Bayly v. Reckord, 51 Fed. Supp. 507 .....	15, 18, 20, 45
United States ex rel. Filomio v. Powell, 38 Fed. Supp. 183 .....	19, 51
United States ex rel. Hull v. Stalter, 151 Fed. (2d) 633.. ..	37, 42, 43
United States ex rel. Lawrence v. Commanding Officer, 58 Fed. Supp. 933 .....	20
United States v. Bowles, 131 Fed. (2d) 818, affd. 63 Sup. Ct. 912 .....	15
United States v. Eliopoulos, 45 Fed. Supp. 777.....	59
United States v. Garvin, 71 Fed. Supp. 545.....	39
United States v. Krepper, 159 Fed. (2d) 958.....	57
United States v. Pitt, 144 Fed. (2d) 169.....	23, 25, 40
United States v. Salberg, 287 Fed. 208.....	58
United States v. Walden, 56 Fed. Supp. 777 .....	39
Vermehren v. Sirmyer, 36 Fed. (2d) 876.....	49, 61
Warren v. United States, 199 Fed. 753, 43 L.R.A. N.S. 278	58

<b>Constitutions</b>		Pages
United States Constitution, Amendment 5 .....		2

### **Statutes**

Federal Criminal Code:		
Section 3282 .....	10, 56, 61	
Section 3290 .....		56
Selective Training and Service Act of 1940:		
Section 10(a)(2) .....	15, 38	
Section 11 .....	47, 48	
Section 305g .....	2, 27, 30, 38, 43	
28 U.S.C. Section 2107 .....		3
10 U.S.C.A. Section 1510 .....		55
28 U.S.C.A. Sections 2241 and 2253 (Chapter 646, 62 Stat. 967, 63 Stat. 105) .....		2

### **Regulations**

Draft Board Regulations:		
Section 623.1 .....	2, 15	
Section 623.2 .....		22
Sections 627.1 to 627.61 .....		38
Section 627.11 .....		23
Section 627.12 .....	25, 26	
Sections 627.13, 627.23, 627.25 .....		2
Section 627.13 .....	13, 39	
Section 627.23 .....		38
Section 627.25 .....	28, 43	
Section 627.26(a) .....		40
Section 627.26(c) .....	41, 43	

### **Rules**

Federal Rules of Civil Procedure:		
Rule 73 .....		3
Rule 75 .....		25

### **Texts**

32 C.J.S., par. 1038, page 1089 .....		49
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Appeal from the United States District Court for the Northern  
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**OPENING BRIEF FOR APPELLANT.**

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This is an appeal from an order of District Judge Herbert W. Erskine of the District Court of the United States for the Northern District of California, Southern Division, filed April 27, 1950, dismissing appellant's petition for a writ of Habeas Corpus which alleged that the appellant was unlawfully imprisoned and restrained under the color of authority of respondents, the commanding officers of the Sixth Army, Presidio, San Francisco, and discharging the writ of Habeas Corpus theretofore issued.

## I.

**JURISDICTIONAL STATEMENT.**

The jurisdiction of this Court is founded upon Chapter 646, 62 Stat. 967, 63 Stat. 105, 28 U.S.C.A. Sections 2241, and 2253 providing for the issuance of writs of habeas corpus and for appeals from orders discharging the same.

The case arises under and involves the interpretation of the Selective Training and Service Act of 1940, Section 305g (50 U.S.C.A., appendix), the Selective Service Regulations, Sections 623.1, 627.13, 627.23, 627.25, issued thereunder, and Amendment 5 of the U. S. Constitution.

By order of this Court dated October 17, 1950, leave was granted to appellant to prosecute this appeal upon a typewritten transcript of the record, copies of which have been duly prepared and filed as required by Subdivision 2 of Rule 11 of this Court. Volume one of said transcript of the record contains the following pleadings and papers as the basis for this appeal:

Petition for writ of habeas corpus, order for issuance, and return;

Return to writ of habeas corpus;

Memorandum opinion of the Court;

Order discharging the writ of habeas corpus and dismissing petition;

Notice of appeal;

Designation of record;

Appellant's statement of points to be relied upon on appeal;

Appellant's and respondent's exhibits.

The notice of appeal on behalf of the petitioner-appellant herein was filed on April 28, 1950 and well within the sixty day period required of 28 U.S.C. Section 2107 and Rule 73 of the Rules of Civil Procedure of the District Courts of the United States in a case in which the United States or an officer or agency thereof is a party.

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## II.

### STATEMENT OF THE CASE.

The statement of facts found by the lower Court and set forth in the Memorandum Opinion of District Judge Erskine, as filed in the transcript of record, is hereby accepted by appellant as a fair presentation of the basic facts of the case, and incorporated herein by reference.

Briefly summarized those facts are as follows:

On June 20, 1941, the appellant, Milton Harold Cox, returned his Selective Service Questionnaire to the Local Draft Board No. 111, Santa Clara County, California, as required by the Selective Training and Service Act of 1940. In this questionnaire the appellant indicated by appropriate notation that by reason of religious training and belief he was conscientiously opposed to participation in military service. At that time he made no claim to being a minister or student preparing for the ministry.

On June 25, 1941, the appellant personally delivered to the local board a letter claiming that he was

an ordained minister of religion for Jehovah's Witnesses, entitled to a IV-D classification, and requesting such classification. Apparently this letter with supporting documents was lost or misplaced in the records of the local board.

On February 6, 1942 the Special Form for Conscientious Objectors—DSS Form 47—was sent by the local board to the appellant.

On February 9, 1942 the appellant wrote to the local board enclosing copies of his letters of June 1941, stating that they were the basis for his requested classification as a minister of the gospel, and that he had been advised that the local board had no record of these letters.

On February 15, 1942 the chairman of the local board, Will B. Weston, made a written memorandum which was placed in appellant's selective service file to the effect that he had personally investigated appellant's objections to service, found them to be sincere, and recommended his classification as IV-E (conscientious objector). On February 19, 1942 the appellant filed with the local board the above-mentioned Form 47, Special Form for Conscientious objectors, in which he reiterated his claim for exemption as a conscientious objector and explained in detail the basis for the claim.

Nevertheless, the local board classified the appellant I-A-O. Therefore, on March 16, 1942 appellant appealed from this I-A-O classification and requested that the Appeal Board of Santa Clara

County place him in classification IV-D, minister of the gospel. This appeal is of importance in this case, and therefore is quoted in full. It reads as follows:

“Gentlemen:

I hereby appeal from the classification 1A-O given me by Santa Clara County Draft Board No. 111 and request that I be placed in class 4-D by reason of the fact that I am a minister of the gospel.

I am a member of Jehovah’s Witnesses and we are taught and instructed to preach the word of God direct from the Bible. Membership in the organization makes each member a minister of the gospel with the duty to preach the word of God.

I have not attended any religious school but have studied under the direction of the leaders in Jehovah’s Witnesses.

I am employed by Pacific Manufacturing Company during the day but hand out booklets and literature to people who are interested and play phonograph records to people who are interested and then return to talk with them upon request. I contend that these facts make me a minister and respectfully request that I be placed in class 4-D.

Respectfully submitted

Milton Harold Cox” (Sgd.)

On April 10, 1942 the Appeal Board returned the appellant’s file to the local board, affirming the I-A-O classification on the ground that the appellant did not appeal as a conscientious objector “but *only* be-

cause he claims to be a minister of religion", which latter claim could not be upheld. The letter denying the appeal reads as follows:

"Dear Sirs:

We are sending you herewith the questionnaire and file of Milton Harold Cox, No. 4685.

The action of your board in placing the registrant in Class 1-A-O has been affirmed.

The registrant does not appeal as a conscientious objector, but only because he claims to be a minister of religion. He says in his appeal that every member of Jehovah's Witnesses is a minister of the gospel. This would seem to leave no one to form the body of the church or congregation and this board is of the opinion that registrant does not qualify either as an ordained or as a regular minister of the gospel.

Very truly yours,

Board of Appeal No. 9

By C. C. Coolidge (Sgd.)

Chairman"

CCC:GOC

Inclosure

Upon advice from the State Director of Selective Service that the appellant's name was not listed on the Certified List of Jehovah's Witnesses who were entitled to consideration for a IV-D classification, the local board on May 8, 1942 notified the appellant that his I-A-O classification would stand.

On June 12, 1942 the appellant reported for induction at the induction station in San Francisco. He claims that he did not take the induction oath at this

time or at any time, but that he continued on to the Presidio at Monterey with his draft group on the representation that he would there get a further hearing on his classification.

Appellant was then sent to a basic training camp in Alabama. He refused to take part in military training and at the first opportunity boarded a train and returned to his home in San Jose, where he has resided openly ever since.

Appellant obtained a job with one of his former employers, thereafter changed his employment from time to time, but at all times remained in San Jose. He made absolutely no attempt to conceal his identity, or his address, or residence, or whereabouts. He was arrested by agents of the Federal Bureau of Investigation about May, 1949, almost seven years after he had left Camp Rucker in Alabama. During this period he has supported his wife, and so far as the record shows, has been a law-abiding, industrious citizen.

The Army did not turn over his name to the Federal Bureau of Investigation until April, 1949, and its agents had no trouble whatever in finding and apprehending him. They just went to San Jose, located him and arrested him. In this connection it might be mentioned that after his return to San Jose in discussing his military status with his employers, or prospective employers, he stated that he had received a medical discharge from the Army.

After his arrest he was turned over to the Army authorities, and tried by a court martial for desertion

in time of war, found guilty, and sentenced to five years at hard labor. This conviction was set aside and a retrial ordered. Pending this retrial he brought these proceedings.

The appellant contends that he was never legally inducted into the Army and hence is not subject to the jurisdiction of the respondents, and that even had he been so inducted, his prosecution by a military court seven years after the alleged offense is barred by statute of limitation.

It is admitted by the lower Court and proved by all the evidence that appellant was and is a sincere conscientious objector, who duly registered as such with his local draft board, the chairman of which after personal investigation reported to the board and recommended in writing that appellant be classified as such and assigned to non-military service. The chairman so testified at the hearing (R. 59-73) and his report to the local board was admitted in evidence as a part of appellant's selected service file.

The local board, however, completely disregarded the report of its own chairman and all evidence in appellant's selective service file proving his right to exemption from military service as a conscientious objector, and instead ordered him inducted into the Army. It is appellant's contention that this action was arbitrary, capricious and beyond the jurisdiction of the local board, and is a denial of due process of law, rendering its induction order invalid.

Appellant in addition to claiming exemption from military service as a conscientious objector, also claimed exemption as a minister of religion, pursuant to the accrediting certificate given him by his religious organization. When the local board classified him as I-A-O, he wrote a letter to the appeal board appealing from such classification, and stressing his right to exemption as a minister of religion. Appellant's second point is that, by this informal notice of appeal, he did not abandon his right to exemption as a conscientious objector.

Appellant's third point is that the appeal board failed to give due consideration to his appeal and to review the whole record, including his claim to exemption as a conscientious objector, as required by the Selective Service Act and Regulations, and also denied him due process of law in other material respects.

The District Judge admits in his opinion that the local board erred in refusing to classify appellant as a conscientious objector, but advances the theory that the invalidity of its induction order was somehow cured by the subsequent actions of the defendant, whether or not he refused to take the oath of induction into the Army. Appellant claims that a void induction order is a nullity, and cannot later be resurrected by subsequent acts outside of the jurisdiction of the issuing board. He also claims that his whole course of conduct thereafter, including his refusal to take the oath of induction, confirms and emphasizes his right to exemption as a conscientious objector, and estab-

lishes that he was never legally inducted into the Army, and hence not subject to military jurisdiction.

Finally, appellant contends that even had he been duly inducted into the Army and had deserted, the failure of the Army to arraign him for trial within three years after the alleged desertion occurred constitutes a bar to his prosecution, under the limitation contained in Section 3282 of the Federal Criminal Code.

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### III.

#### **SPECIFICATION OF ERRORS.**

The statement of points relied upon in this appeal, as filed in the transcript of record herein, is hereby incorporated in this brief by reference and made a part hereof. Briefly summarized the asserted errors of the District Court that are relied upon by the appellant are as follows:

1. In dismissing the petition for a writ of habeas corpus and discharging the writ of habeas corpus therefore issued.

2. In finding that Cox waived the invalidity and/or the irregularity of the induction order of the local board by his notice of appeal and/or by his subsequent conduct.

3. In failing to find that the action of the local and the appeal boards was arbitrary, capricious and a denial of due process.

4. In finding that Cox's appeal did not involve the question whether his claim as a conscientious objector should be sustained.

5. In failing to find that the appeals board should have renewed the whole record *de novo* and to classify Cox independently.

6. In finding that the appeals board complied with the requirements for preliminary review of the file.

7. In finding that the action of the appeals board in not reviewing the whole record and not classifying Cox independently was valid.

8. In finding that the induction order was valid.

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#### IV.

#### ARGUMENT.

##### POINT I.

**THE LOCAL BOARD'S CLASSIFICATION WAS ARBITRARY, CAPRICIOUS, BEYOND ITS JURISDICTION, AND A DENIAL OF DUE PROCESS, HENCE ITS INDUCTION ORDER WAS INVALID.**

All of the evidence before local board No. 111 established the fact that Cox was a conscientious objector and entitled to be classified IV-E. His file contained a written memorandum of the board chairman, Will B. Weston, who had investigated his claim, stating that Cox was "A Jehovah's Witness claiming Exemption B. Checked with Purdy of Security who believes the objection to be sincere and not for evasion of

service, to which the internal evidence in Form DSS47 tends. Also—after physical examination, appropriate action would be IV-E or IV-ELS. Recommended by W. B. Weston 2/15/42.” (R 63.)

There was also some evidence before the board that Cox was entitled to a IV-D classification as a minister of Jehovah’s Witnesses, such as the internal evidence in his selective service questionnaire filed June 15, 1941; the ordination certificate of the Watch Tower Bible and Tract Society, the governing body of his denomination; and the certificate of W. O. Furtwengler, Company Servant (Leader) of San Jose Company of Jehovah’s Witnesses, that Cox “is serving as a minister of religion for Jehovah’s Witnesses.” (R 92-93.)

Even this information supported Cox’ claim that he was a conscientious objector. It was the practice of the local boards to regard all claimants for ministerial exemption as conscientious objectors, and to require them to file additionally the special conscientious objector’s form, as filed by Cox. (See *Lawrence v. Yost*, 157 Fed. (2d) 44.)

The local board prior to classifying Cox IAO made no investigation of his claim that he was a minister of Jehovah’s Witnesses. Indeed, there is not in his selective service file one shred of evidence upon which any finding could be based that he was not a recognized minister of his religious group. On the contrary, all of the evidence in the file on this point supports Cox’ claim. Only *after* Cox had been thus classified for military service and the appeal board,

without reviewing the record, had affirmed the classification, was the local board advised by the State Director of Selective Service that Cox' name was not on the list of ministers of Jehovah's Witnesses, which list was discontinued by order of the National Director of Selective Service, November 2, 1942. Thus this fact was of no importance; yet the local board upon that basis rather than from a determination of his status according to the facts of his individual case notified him that his IAO classification would stand.

The board did, however, investigate through its chairman, Will B. Weston, Cox' claim that he was a conscientious objector, with the finding, as aforesaid, completely sustaining this claim in every respect. The board's duty was therefore clear. On the basis of Cox' questionnaire, his Form 47, and the written memorandum of its chairman that Cox was a sincere conscientious objector, it was legally bound to classify him IV-E and assign him to non-military service.

The board, however, arbitrarily and capriciously and without one iota of supporting evidence classified him as IAO. Chairman Weston testified on the trial below that this was due to the great pressure exerted on the board by Selective Service headquarters to fill the heavy quotas allocated to it, and because of prejudice against Jehovah's Witnesses and conscientious objectors. (R 68-72.)

Having acted beyond its jurisdiction, the board then proceeded to ignore other provisions of the regulations governing its actions. Section 627.13 thereof required the local boards in all cases to prepare and

place in the file a written summary of any facts considered by the board which do not appear in the written information in the file. Opinion 14 (amended) of the director of Selective Service required them in the case of registrants who were Jehovah's Witnesses to place in the file of such a registrant "a record of all facts entering into its determination, for the reason that it is legally necessary that the record show the basis of the local board's decision." (See *Wesley Cox v. United States*, 332 U.S. 442, at page 450.)

These requirements are so fundamental that on an appeal the first duty of an appeal board is to make a preliminary review of the file to determine whether the record contains this written summary of all the facts considered by the local board in making its classification. If it does not, the record is incomplete and the file must be returned to the local board. (Sec. 627.23.) If this is not done the registrant is denied his right to an adequate consideration of his case on appeal and due process. (*Smith v. United States*, 157 Fed. (2d) 176.)

The local board here, however, failed in its duty to place any such summary in the file to support its classification of Cox as IAO; and clearly it could not do so, because all the information before it indicated that Cox was entitled to be classified as a conscientious objector. But if it had had any other information, it failed completely to perform its legal duty to show the basis of its classification.

The conclusion is inescapable here that Cox' IAO classification was based upon a discrimination against

him because of his creed and membership and activity in Jehovah's Witnesses. Section 623.1 of the regulations forbids a classification on such a basis; and a board which acts in the teeth of the regulations is acting lawlessly and beyond its jurisdiction. *Estep and Smith v. United States*, 327 U.S. 113, 90 L. Ed. 567.

The powers of these boards which administer the Selective Service system established by the President under the authority of Section 10(a)(2) of the Selective Training and Service Act of 1940 and of the Courts to review their actions was under consideration in the *Estep* case. The Supreme Court held there that, although the statute made no provision for judicial review of the actions of such boards, the Court, nevertheless, could review their acts where the boards acted so contrary to the authority granted them as to exceed their jurisdiction. The authority of the boards to hear and determine all questions of exemption is limited to orders within their respective jurisdictions. It is only such orders that are final and not subject to judicial review. A classification for which there is no basis in fact is beyond the jurisdiction of the board, and may be judicially reviewed. (See also *United States v. Bowles*, 131 Fed. (2d) 818, affd. 63 Sup. Ct. 912; *United States ex rel. Bayly v. Reckord*, 51 Fed. Supp. 507; *Ex parte Stewart*, 47 Fed. Supp. 410.)

The Court, in the *Estep* case, gives as an example of an order beyond a local board's jurisdiction a classification or order to a registrant to report for

induction as available for military service because he is a Jew, a German, or a Negro. (In the instant case we have an 1AO classification of a registrant because he was a Jehovah's Witness.) It points out that it is dealing here with a question of personal liberty and that the stigma and penalties of criminality should not attach to one who wilfully disobeys an induction order which may be constitutionally invalid, or unauthorized by statute or regulation, or issued by mistake, or solely as the result of bias and prejudice. Constitutional rights are not to be impaired or destroyed nor illegal administrative discretion substituted for constitutional safeguards.

The Court below acknowledged its jurisdiction to review the action of the local boards where the record "discloses no substantial basis for the classification order made therein," and to declare the order of induction invalid; but it exercised that jurisdiction only to the extent of declaring that there was no basis in Cox' selective service record up to his classification for the order that was made. It stated that his file "up to the time of his appeal from the order giving him the classification of 1AO showed no basis for giving him any other classification than that claimed by him, to-wit: conscientious objector." (Transcript: Opinion, p. 7.)

The Court, however, confusing the fundamental difference between a constitutionally invalid order and a mere irregularity in procedure, refused to declare the induction order invalid, because "of what occurred in connection with his appeal from the first

order of his local board.” (Id. p. 7.) In other words, Cox’ subsequent conduct on his appeal cured the infirmity of this constitutionally invalid order issued with such a singular lack of procedural due process!

Apparently not very sure of itself, the Court went a step further and sought to bolster up this theory by stating that if Cox’ conduct in connection with his appeal did not have this effect, his conduct subsequent to the appeal, or after leaving the induction center, amounted to a waiver of any irregularity in his induction. (Id. p. 14.)

If there is one point which the *Estep* case makes clear, it is that the unconstitutional invalidity of an induction order may be urged at any time in any kind of proceeding, habeas corpus or criminal. As Mr. Justice Murphy said in the *Estep* case, *supra* (at page 125) :

“To sustain the convictions of the two petitioners in these cases would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity to prove that the prosecution is based upon an invalid administrative order. That is a proposition to which I cannot subscribe. It violates the most elementary and fundamental concepts of due process of law. \* \* \* To sanction such a proposition is to place an indelible ‘blot upon our jurisprudence and civilization’, *McVeigh v. United States*, 11 Wells (U.S.) 259, 267, 20 L. Ed. 80, 81, which cannot be justified by any appeal to patriotism or wartime exigencies.”

See also *Baxley v. United States*, 4th Cir., 1943, 134 Fed. (2d) 998, where the Court at page 999 said:

“If the order of the board is found to lack foundation in law or to be unsupported by substantial evidence, or to be so arbitrary and unreasonable as to amount to a denial of due process, the Court should treat it as a nullity \* \* \*”

The cases cited by the Court in support of its novel theory (*United States v. Flint*, 54 Fed. Supp. 889, affd. *Altieri v. Flint*, 142 Fed. (2d) 62; *Mayborn v. Heflebower*, 145 Fed. (2d) 864; *Sanborn v. Callan*, 148 Fed. (2d) 376) simply do not support it. None of these cases involved an invalid induction order, but only an irregularity in the induction procedure. There was a basis in fact for all of the classifications in those cases, and they were therefore within the jurisdiction of the several boards.

Moreover, in the cited cases, there were express waivers by the registrants of the irregularities of induction procedures bottomed upon valid orders. While such irregularities may be waived either expressly or impliedly, a constitutional invalidity may not be. These cases are considered in detail hereafter, the *Flint* case on the discussion as to whether there was a waiver by reason of the notice of appeal (Point II); and the *Mayborn* and *Sanborn* cases on whether there was such a waiver after induction (Point III).

The other Courts which have considered this theory have rejected it. In *United States ex rel. Bayly v. Reckord*, supra, a local board intentionally and arbitrarily disregarded applicable regulations and selected

two married men for induction while there were volunteers and single men without dependents available to fill the quota. The government contended that the individual petitioners were estopped to complain of the invalidity of the board's order because of certain personal conduct. The Court held that such an argument "misconceives the purpose of the regulations", and that the regulation, whose "primary purpose was to express the national policy," "must be observed, not so much out of tenderness for the individual but for the public benefit." (at page 515).

*In re Herman*, 56 Fed. Supp. 733, the waiver theory was spurned in the case of a registrant who refused to submit to induction, but who donned a uniform, participated in some simple drills and in soldier activities, and did "carry on in a fashion, though not satisfactorily." (page 734.)

In *United States ex rel. Filomio v. Powell*, 38 Fed. Supp. 183, the Court held that there was no waiver of civil relief by conduct where a registrant submitted with unequivocal protest to induction. The Court held that he was not required forcibly to resist induction. The induction order was held to be valid, however, because the actions of the board were considered a reasonable exercise of its power to refuse a reclassification of the registrant.

The act of an appeal board in affirming a classification made without basis in fact cannot validate a constitutionally invalid act, but only accentuates it. Thus in all the cases where the Courts have judicially reviewed the acts of these administrative agencies,

there had been such an affirmance. (See *United States ex rel. Bayly v. Reckord*, supra; *United States ex rel. Lawrence v. Commanding Officer*, 58 Fed. Supp. 933; *Estep and Smith v. United States*, supra; *United States ex rel. Hull v. Stalter*, 151 Fed. (2d) 633; *Miller v. United States*, 169 Fed. (2d) 865; *Wesley Cox v. United States*, 332 U.S. 442, 68 S.Ct. 115, 92 L.Ed. 59.) In *Estep and Smith v. United States* the 1-A classifications given the registrants, who were ministers of Jehovah's Witnesses, were affirmed by the appeal boards, but the Supreme Court reversed their convictions for refusal to submit to induction into the armed forces on the ground of the invalidity of the induction orders.

The latest Supreme Court case to consider the requirement that an induction order must be based on substantial evidence, else it is constitutionally invalid, is *Wesley Cox v. United States*, supra. The Court there divided 5 to 4 on the question whether the evidence in Cox's file was substantial enough to prove that he was a minister of Jehovah's Witnesses. The late Justice Murphy's statement at page 458 is highly significant:

"This is a criminal trial. It involves administrative action denying that defendant has conscientious or religious scruples against war or that he is a minister. His liberty and his reputation are dependent upon the validity of that action. If the draft board classification is held valid, he will be imprisoned or fined and will be branded as a violator of the nation's law; if that classification is unlawful, he is a free man. Moreover,

he has had no previous opportunity to secure a judicial test of this administrative action, no chance to prove that he was denied his statutory rights. Everything is concentrated in the criminal proceedings. These stakes are too high, in my opinion, to permit an inappreciable amount of supporting evidence to sanction a draft board classification. Since guilt or innocence centers on that classification, its validity should be established by something more forceful than a wisp of evidence or a speculative inference. Otherwise, the defendant faces an almost impossible task in attempting to prove the illegality of the classification, the presence of a mere fragment of contrary evidence dooming his effort. And such a scant foundation should not justify brushing aside bona fide claims of conscientious belief or ministerial status. If respect for human dignity means anything, only evidence of a substantial nature warrants approval of the draft board classification in a criminal proceeding."

What would the late Justice Murphy have said in the instant case, where there is not only no "wisp of evidence" in Milton Cox's file to support the board's induction order, but on the contrary, all the evidence therein absolutely supported his right to be classified as a conscientious objector assignable only to a civilian public service camp!

The instant case is clearly one where the local board flagrantly violated the rules and regulations which defined its jurisdiction. Search where you may, you will not find any other case where a board so completely disregarded all the written evidence in the

registrant's file, which is the only evidence it could legally consider. (Sec. 623.2.)

Cox was thus denied due process, and the induction order was therefore a complete nullity for all purposes. This infirmity was not cured by any subsequent acts of either Cox or the Appeal Board; but on the contrary, the failure of that board to review the whole record on appeal and to classify Cox independently on the basis of all the evidence in the file aggravated that denial of due process.

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## POINT II.

**COX DID NOT ABANDON THE CLAIM THAT HE WAS A CONSCIENTIOUS OBJECTOR BY HIS NOTICE OF APPEAL.**

Though the 1-A-O classification of the local board was a nullity, the Court below, on the authority of *U.S. v. Flint*, 54 Fed. Supp. 889, *affd.*, *Altieri v. Flint*, 142 Fed. (2d) 62, held that Cox abandoned the claim that he was a conscientious objector in his notice of appeal, and that the appeal was therefore limited to the question of whether he should have been classified as a minister of the gospel.

This highly legalistic view overlooks the fact that Cox's appeal was "from the classification 1AO given him by the local board", and therefore involved the whole record before that board and the question whether the evidence before the board was sufficient to sustain that classification. His mere request in the notice that he be given a IV-D classification did not relieve the Appeal Board of its legal duty to review

the whole record to determine if there was a basis in fact for the classification given him and then to classify him independently.

The lower Court disregards the highly informal character of the proceedings before these administrative boards, which are not Courts, and which do not permit lawyers to appear before them. (*Harris v. Ross*, 146 Fed. (2d) 355.) Their proceedings have been described as being “stripped of the panoply of formal judicial tribunals.” (*U.S. v. Pitt*, 144 Fed. (2d) 169.)

The Court’s view runs contra to the Congressional intent in these administrative proceedings, and deals with the registrant as though he were engaged in formal litigation, assisted by counsel, and therefore charged with the obligation of examining a record on appeal and drawing up an apt notice of appeal to preserve all errors in the record, at the risk of abandoning all those not specifically assigned.

Clearly the Court below has fallen into the error of drawing an analogy to judicial proceedings and appeals, where assignments of error are required by rules of Court and the failure to specify any particular claim of error constitutes a waiver. In these selective service cases, however, neither the Act nor the regulations issued pursuant thereto require a registrant who appeals from the classification given him by a local board to specify errors.

On the contrary, the regulations provide a most informal method and notice of appeal. Section 627.11,

entitled "How Appeal to Board of Appeal Is Taken", provides in paragraph (a) that "any person entitled to do so may appeal \* \* \* (1) by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeals."

A more informal notice of appeals cannot be imagined. In *Chih Chung Tung v. U.S.*, 142 Fed. (2d) 919, the Court of Appeals for the First Circuit held a simple letter with the statement "I appeal again not to be drafted" a valid appeal. The Court said at page 921:

"From the Act itself and the regulation just quoted (627.11) it is evident that Congress and the administrative officials in charge of the Selective Service System intended not only to guarantee a right of appeal to registrants but also to permit registrant to take appeals freely and with a minimum of procedural formality \* \* \* Viewed in the spirit of liberality and informality reflected by Regulation 627.11 above, we think the letter of September 29, 1942 constituted a valid appeal."

The notice given by the registrant in *U. S. v. Flint*, supra, was even more informal. There the registrant who, like Cox before the local board, claimed that he was entitled to classification either as a minister of

Jehovah's Witnesses or as a conscientious objector, appealed from a 1-A classification of the draft board without stating any grounds of appeal at all, but by a mere "endorsement on his questionnaire". This was held sufficient.

If these administrative appeals were to be assimilated to judicial appeals, how would we account not only for the fact that the notice "need not be in any particular form", but also for the complete absence of the usual required designation by the registrant of the portions of the record, proceedings and evidence which he wishes to be contained in the record on appeal? (See Rule 75, Federal Rules of Civil Procedure.) But in these selective service cases, such a designation or an assignment of errors is absolutely unnecessary, *since the review is on the whole record*, as in an admiralty appeal. (*U. S. v. Pitt*, *supra*; *Reel v. Badt*, 53 Fed. Supp. 906, 907; *Cramer v. France*, 148 Fed. (2d) 801.)

Nor does Section 627.12 of the Regulations have the effect of requiring an assignment of errors. It merely provides that a registrant who takes an appeal "*may* attach to his notice of appeal or to the Selective Service questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, *may* direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and *may* set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

This section was interpreted in *Niznick v. U. S.*, 173 Fed. (2d) 328, and *Smith v. U. S.*, 187 Fed. (2d) 176. The registrants claimed a denial of due process because their files on appeal failed to contain a written summary of all the facts considered by the local board in making its classification. The government contended there that because the registrants held the power to correct the record by attaching to their notices a statement specifying the failures and errors of the local boards, but omitted to do so, they could not complain later; that is to say, they waived the errors which they had failed to specify in their notice. The argument is very similar to the one made by the lower Court herein, that Cox could have claimed in his notice the error of the local board to classify him as a conscientious objector when all the evidence before it showed that he was one, but having failed to do so, he abandoned that claim.

This argument was twice rejected by the Circuit Courts, which held in both of the above cases that the failure of the registrants to so specify the errors of the local board did not constitute a waiver of the right to urge these errors on appeal, nor did the omission relieve the appeal boards of their duty to review the whole record and file of the registrant, or mitigate the consequences of their failure to do so.

Holding the provisions of Section 627.12 as merely directory, the Court in the *Smith* case stated, (p. 183):

“The Regulation confers a privilege but does not impose a duty upon the registrant, for it cannot

be supposed that Congress intended to deal with registrants as if they were engaged in formal litigation assisted by counsel and are therefore charged with the obligation to examine and approve a record on appeal.”

The lower Court here, however, would place the heavy burden on every registrant who appeals from a classification by a local draft board to examine and approve the transcript of record for the purpose of detecting error and the preparation of a notice of appeal, a burden which Congress never intended to place upon inexperienced litigants, appearing without the aid of counsel, in these non-judicial proceedings.

The intent of Congress with respect to conscientious objectors is frustrated in another respect. Congress has surrounded these claimants with a special safeguard. Section 305(g) of the Act provides:

“Nothing contained in this Act shall be construed to require any person to be subject to combat training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combat training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to non-combat service as defined by the President, or shall, if he is found to be conscientiously opposed to participate in such non-combat service, in lieu of such induction be assigned to work of na-

tional importance under civilian direction. Any such person claiming such exemption from combat training and service because of such conscientious objection shall, if such claim is not sustained by the Board, be entitled to an appeal to the appropriate appeal board provided for in Section 10(a). Upon the filing of such appeal with the Appeal Board, the Appeal Board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the Appeal Board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to non-combat service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such non-combat service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If, after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained.”

Section 627.25 of the Regulations provide:

“If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the board

of appeal shall first determine whether the registrant should be classified in one of the classes set forth in Sec. 623.21 or in the order set forth, and if so determined, it shall place such registrant in such class. If the board of appeal does not determine that such registrant belongs in one of such classes, it shall transmit the entire file to the U. S. District Attorney for the judicial district in which the local board of the registrant is located for the purpose of securing an advisory recommendation of the Department of Justice. \* \* \*

The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the board of appeal that if the registrant is found to be conscientiously opposed to participation in such non-combatant service, he shall be assigned to work of national importance under civilian direction. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the board of appeal that such objections be not sustained.”

The Court below reads a special requirement into the Act and the Regulations. Whenever a registrant wants to appeal from a classification of a local board which ignores his claim that he is a conscientious objector, his notice of appeal (unlike in other cases) must state that he claims to be such.

A proper reading of section 305(g) of the Act and the regulations indicates that an appeal involving such a claim is not a special kind of appeal. The word “such” in the phrase “upon the filing of such appeal” relates back to the words “an appeal” and merely means “this”. The statement does not impose an additional procedural burden on a registrant, but only an additional safeguard in his favor, to wit, the necessity of a reference of such claim to the Department of Justice for an investigation.

The Court below is so confused about the true nature of a waiver at law that it speaks of Cox as having, if not expressly at least “impliedly” abandoned his claim to be classified a conscientious objector. It is elementary that there can only be a waiver of a right where there is a “voluntary abandonment or surrender by a capable person of a right *known to exist* with the intent that such right shall be surrendered and such person forever deprived of its benefits.” *Serman v. Roberts*, 191 S.W. (2d) 824, 825, 826, 209 Ark. 586.

“A waiver cannot be based on mistake or negligence.”

*Tetreault v. Campbell*, 61 A. (2d) 591, 115 Vt. 369.

“It is a conscious, deliberate relinquishment of a known right.”

*Orlando v. Camden Co.*, 39 A. (2d) 238, 132 N.J.L. 173;

*Du Bois Nat. Bank v. Hartford Accident and Indemnity Co.*, 161 Fed. (2d) 132;

*Missouri State Ins. Co. v. Le Fevre*, 10 S.W. (2d) 267, 269.

Certainly in a proceeding like this where, as the Supreme Court reminds us in the *Estep* case (*supra*, at p. 118), we are dealing with a question of personal liberty, where a registrant who violates the Act commits a felony, we should be loath to resolve any doubts which might exist against a registrant. A waiver under these circumstances should not be lightly found.

If Cox waived his right here, it could only have been by mistake or negligence and therefore no waiver at all. Is it not patently absurd to argue that a young man of twenty-four years of age, unlearned in the law and acting without legal advice (R. 117-118), and generally inexperienced in Court proceedings should know that by writing a letter to an appeal board in which he fails to repeat a claim he previously established before the local board that he is a conscientious objector, thereby “voluntarily” abandons his right to make that claim before the appeals board?

It is a matter of general knowledge that in 1942 and the early years of the war, there was considerable confusion as to whether members of Jehovah’s Witnesses could claim exemption both as conscientious objectors and as ministers. All of the cases relating to the members of this sect reflect this confusion. (*Wesley Cox v. U. S.* (*supra*); *Dodez v. U. S.*, 154 Fed. (2d) 637; *Niznick v. U. S.* (*supra*); *Smith v. U. S.* (*supra*); *U. S. v. Pitts* (*supra*).)

*Wesley Cox v. U. S.* (supra), is typical. There one of the registrants involved, Roisum, filed first a claim to a minister's exemption and later a conscientious objector's form, which the Court observed was "apparently filed under misapprehension, since Roisum did not abandon his contention that he should be classified as a minister".

This Court itself in *Lawrence v. Yost*, 157 Fed. (2d) 44, at page 45, points out the fact that "from a number of cases which we have reviewed, it seems to be general practice for the boards to require all registrants who claim to be ministers to fill out this form. (Form 47, Conscientious Objector.)"

The record here shows that the same confusion existed in Cox's mind. He testified emphatically that he had no intent to abandon his claim to be a conscientious objector when he wrote the letter to the Appeal Board. Cox sincerely thought he was a minister, and he had a certificate from the Watch Tower Bible and Tract Society certifying that he was "an ordained minister of Jehovah God to preach the gospel", as well as one from his "Company Servant", or church superior, W. O. Furtwengler, San Jose Company of Jehovah's Witnesses, certifying that Cox "is serving as a Minister of Religion for Jehovah's Witnesses". (R. 102, 93.) Furthermore, in his letter to the appeal board he stated that he engaged in the part-time religious activity of handing out booklets and literature and played phonograph records to people who were interested, and then returned to talk to

them upon request, a form of door-to-door evangelism recognized by Opinion No. 14 of the Director of Selective Service and the United States Supreme Court in *Wesley Cox v. U. S.* (supra).

This opinion appended a list of certain Jehovah's Witnesses "pioneers" who were entitled to exemption as ministers, and described certain tests to be applied in determining what other Witnesses were entitled to the exemptions, which included the amount of time spent in religious activity. Cox was regarded by his own religious superior as a "pioneer", yet no proof was ever taken by the Board as to how much time he spent in such activity.

It was not until 1947, when the Supreme Court of the United States decided the *Wesley Cox* case (supra) that the status of those ministerial witnesses not on that list was cleared up. In the light of the decision it would appear that the Court below erred in stating that there was no basis in fact for Cox's claim that he was a minister. The evidence in his file met the requirements of four judges of that Court. Mr. Justice Douglas in his dissenting opinion in the *Wesley Cox* case (supra, at page 455), concurred in by Justices Black, Murphy and Rutledge, stated that not only the full-time ministers of the orthodox faiths are included in the exemption, but also the "part time ministers" of the less conventional ones. "These part-time ministers are vehicles for propagation of the faith. By practical as well as historical standards they are the apostles who perform the minister's function

for this group. Their door-to-door evangelism is as much religious activity as worship in the churches and preaching from the pulpits."

Assuming, however, *arguendo* that the Court was correct in its statement that Cox' claim to be a minister was not "supported in any respect by his selective service file," could anyone seriously argue that if this were true, and he had definitely established his "C.O." claim, Cox would voluntarily have abandoned the established claim for the one without basis in fact?

What if he had been advised of his rights by a lawyer or the local Appeal Board? What if he had been told that the record before the local board *completely established* his right to classification as a conscientious objector and that the 1AO Classification, having no basis, was invalid, and that he had only to appeal on that and on no other ground? What if he had been asked by the Appeal Board, as was the registrant in the *Flint* case, whether he intended to rely solely on one or the other ground? And where, all this time, was the Government's Appeal Agent, specifically charged by statute with aiding just such inexperienced appellants as Cox? Could it be that he, too, was prejudiced against Jehovah's Witnesses? If we pass for the moment Cox's strong religious conviction that he would be subject to eternal damnation if he participated in a war, and consider only his obvious self-interest, would even obdurate government counsel contend for one moment that he would have waived the

proved claim which would have served his interest for one which could not be established?

The *Flint* case (supra) relied upon by the lower Court for its novel theory of implied abandonment, does not support any such view at all. The facts of that case show that the abandonment there was had *after* the appeal had been perfected, and so is no basis for holding that a ground may be waived by a failure to set it forth in the notice. There the registrant was given the regular conscientious objector's hearing, which Cox was never given. At that hearing, the hearing officer inquired of him whether his appeal was based on the claim that he was an ordained minister or whether it was on the ground that he was a conscientious objector, or upon both. The registrant replied that his appeal was based "solely on my claim of being an ordained minister."

Clearly this was an express waiver, if there could ever be one. It was comparable to those familiar situations in criminal cases where a defendant can only waive his rights in open Court on his own *voir dire*, and after the Court finds that the defendant understands his right and freely waives it.

There is another fatal weakness in the *Flint* case. There was there "at most only scant evidence of religious scruples against participation in war". Though the registrant told the board that he did not believe in fighting, this statement was expressly made in support of his claim for classification as a minister,

and the Court found that the relator's objections were not necessarily attributable to religious scruples, but could have been attributable to a state of mental confusion or emotional instability or from inadequate sleep and nourishment.

In the instant case, however, Cox's claim had been completely established even to the satisfaction of the chairman of the local board, Will B. Weston, who placed his written memorandum in Cox's selective service file to the effect that he personally investigated his claim and found his objections to military service to be sincere, and recommended his classification as IV-E—Conscientious Objector. (R. 63, 72; Appellant's Exhibit 3.)

Additionally, Cox testified in the lower Court that he could not participate in a war, as he would be breaching his covenant with God, and would thereby incur the dreadful penalty of eternal damnation. Thus his objections to service were clearly attributable to conscience and religious convictions. (R. 19-20.)

Cox's state of mind as to whether he ever intended to waive the claim that he was a "C.O." is shown by his conduct subsequent to the Appeal. At the trial he testified that the secretary of the local board told him that he would be given a hearing at the induction center on this claim; that when he appeared for induction in San Francisco, he told the officer there that he was a C.O. and was told by him to go ahead with his physical examination and that he would be given a hearing in Monterey, and that at Monterey he was

told that he would get a hearing on his claim at Camp Rucker. There, too, he asked for such a hearing, but never got one. (R. 30, 32, 33, 41.) He wrote a letter to his wife from there in which he stated that he was having trouble with the commanding officer because he was a conscientious objector. (Exhibit 4; R. 36, 82-85.) This testimony, which was uncontradicted and therefore binding on the Court, clearly indicated that Cox never for a moment believed that he had waived his claim to exemption as a C.O.

*If there was no review on appeal, there was no appeal, and the notice of appeal would be ineffectual for any purpose.* It is, moreover, difficult to see how there could be a waiver by the notice of appeal of any ground of appeal involved in the registrant's file where the *very appeal* itself is not considered a waiver of the basic invalidity of an induction order which is beyond the jurisdiction of the board and is therefore a nullity. (*Estep and Smith v. U. S.* (supra); *U. S. ex rel. Hull v. Stalter* (supra), and other cases cited under Point I hereof.)

It is respectfully submitted that Cox did not waive his claim to be classified as a conscientious objector by his notice of appeal, nor did he waive the constitutional invalidity of the classification of the local board, either by his notice or otherwise.

## POINT III.

THE APPEAL BOARD FAILED TO GIVE ADEQUATE CONSIDERATION TO COX' APPEAL AND TO REVIEW THE WHOLE RECORD AND HIS CLAIM TO BE A CONSCIENTIOUS OBJECTOR, AND DENIED HIM DUE PROCESS IN OTHER MATERIAL RESPECTS.

The denial of due process by the local board was accentuated by the action of the appeal board established by the President under the authority of Section 10(a)(2) of the Act (50 U.S.C.A. App. Sec. 310(a)(2) 11, FCA Tit. 50, App. 5, Sec. 10(a)(2)) in failing to follow the provisions governing appeals to the Boards of Appeal contained in Sections 627.1 to 627.61 of the Regulations, and the special appeal procedure for conscientious objectors set forth in Section 305(g) of the Act.

When an appeal is taken, one of the first duties of the appeal board is to make a preliminary review of the file. Section 627.23 of the Regulations provides that "the appeal board will carefully check each file to determine whether all steps required by the Regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If any steps have been omitted by the local board, \* \* \* if the record is incomplete, or if the information is not sufficient to enable the appeals board to determine the classification of the registrant, the appeal board shall return the file to the local board with a request for additional information or action.

The appeal board here did not follow the Regulations. If it had done so, it would have discovered the

fact that the file did not contain the written summary of the facts forming the basis of the local board's 1AO classification, as required by both Opinion 14 and Section 627.13, and would have returned the file to the local board with a request that such a summary be included.

The failure of the local board to include such a statement and of the appeal board to require its inclusion is in itself the denial of an adequate consideration of the appeal which amounts to a denial of due process. (*United States v. Garvin*, 71 Fed. Supp. 545; *United States v. Walden*, 56 Fed. Supp. 777.) In *Smith v. United States*, 157 Fed. (2d) at page 176, the Court said:

“These regulations clearly require that the record of a registrant on appeal to the board of appeal shall contain a written summary of all the facts considered by the local board in making its classification, and since the conclusions of the board of appeals are necessarily based upon the written record, omission of material facts deprives the registrant of his right to an adequate consideration of his case on appeal and amounts to a denial of due process by the local board which invalidates its classification and order of induction into the armed services.”

See also *Niznick v. United States*, 173 Fed. (2d) 328; cer. denied, 69 S.Ct. 1169, where the Court said:

“Since the conclusions of the board of appeal are necessarily based upon the written record, omission of material facts deprives the registrant of an adequate consideration of his case on appeal

and amounts to denial of due process by the local board, which invalidates its classification.”

The next duty of the board was to review *de novo* the whole record as in an admiralty appeal, and to classify the registrant independently. (Regulations, Sec. 627.26(a); *United States v. Pitt*, supra; *Reel v. Badt*, 53 Fed. Supp. 960; *Cramer v. France*, 148 Fed. (2d) 801.) The Ninth Circuit Court of Appeals in the latter case decisively settled this point. The hearing before the appeal board must be *de novo*: “The action of the board of appeal completely supersedes the action of the local board in classifying applicants.” (at page 801.)

The Third Circuit Court of Appeals in deciding *United States v. Pitt*, supra, gives an excellent summary of the requirements laid down by the Act and Regulations with respect to appeals. After pointing out that the procedure is not technical, since lawyers are not allowed to appear before either the local or appeal boards in behalf of registrants, the Court states:

“It (the Selective Service Act) provides that no information in respect to any registrant may be considered by a local board unless it is reduced to writing and placed in the file of the registrant \* \* The right of a registrant to appeal his classification to the appeal board is absolute and unconditional. The boards of appeal in substance must dispose of each case on the record sent to them by each local board, and local boards are admonished to refrain from expressions of

opinion or argument in support of their decisions. See Sec. 627.13(b) of the Regulations. An appeal board is bound in no wise to award to registrant the classification given him by his local board; in fact, an appeal board must hear and dispose of each case *de novo in the same manner as must an appellate tribunal on an appeal in admiralty*. See 627.2(a) of the Regulations. Each appeal board, therefore, independently imposes a classification upon a registrant without regard for that which was given him by his local board. Moreover, the classification of the appeal board supersedes that of the local board \* \* \* The proceedings before the local board and the appeal boards are informal, stripped of the panoply of formal judicial tribunals.” (Italics supplied.)

Thus in every case, no matter what the claim involved may be, the whole record goes up on appeal, and this irrespective of what the registrant may state in his notice or whether he states anything at all.

What would be the purpose of sending up the whole record if not that the appeal board should review it to enable it to classify the registrant on the basis of its own examination of the record, independently of the local board, as required by Sec. 627.26(c) of the Regulations?

The appeal board here made no such review of the file. Though Cox was entitled to an adequate consideration of his appeal, it gave him none. It merely noted that he had not appealed as a conscientious objector (in other words, he had not assigned as error the failure of the local board to so classify him), but as a minister of religion. Without reviewing even that

claim, on the basis of his statement in his appeal that “every member of Jehovah’s Witnesses is a minister of the gospel”, and because it arbitrarily asserted that if this were true, it “would seem to leave no one to form the body of the church or congregation” (Transcript: Opinion, p. 4), it affirmed (not classified independently) the 1AO classification of the local board.

The attitude and action of the board here is to be contrasted with that of the Court in *United States ex rel. Hull v. Stalter*, supra, where the registrant in his notice set forth the same statement. The Court there said (at page 637): “We do not agree with relator’s argument that all members of the organization are ministers and exempt from military service”; yet it held that upon all of the facts he was entitled to be classified as a minister, stating:

“Neither do we agree with the government’s argument that the activities and doings of all the members of the organization may be taken into consideration in determining whether a particular member is entitled to exemption. In our view, every registrant, whether he be Jehovah’s Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant’s classification should be determined by the realities of the situation, not merely by what he professes.”

It should be pointed out that not only did the appeal board fail to handle Cox’ claim to be a minister intelligently, but neither did the local board, either before or after the appeal. After the appeal board affirmed the classification, the local board notified Cox

that, upon advice from the State Director of Selective Service that his name was not listed on the certified list of Jehovah's Witnesses who were entitled to exemption as ministers, the 1AO classification would stand. The Court in the *Hull* case (supra) held that the fact that a registrant's name was not on that list was of no importance, but that he was entitled to have his own status determined according to the facts of his individual case. Opinion 14 dealing with Jehovah's Witnesses and the Supreme Court in *Cox v. United States* (supra) also require such a determination in the case of a claimant whose name is not on the list, which list was finally completely disavowed by the National Director of Selective Service as of no use whatsoever.

Irrespective of the merits of this claim, if the appeal board had reviewed the whole file it would have found not only the complete absence of any evidence to support the local board's classification, but also the memorandum of Chairman Will B. Weston which completely established Cox' right to a IV-E classification as a conscientious objector. Instead of merely affirming the classification without even examining his complete file, it would have classified him independently, as required by Section 627.26(c) of the Regulations.

The appeal board, as a corollary to its failure to review the whole record, also failed to comply with the requirements of Section 305(g) of the Act and Section 627.25 of the Regulations, which made it mandatory upon the Board where conscientious objections to military service are involved to refer the file to the

Department of Justice for further investigation and a formal hearing.

The Court below excused the failure of the appeal board to review the whole record on the theory that Cox abandoned the claim that he was a conscientious objector by his notice of appeal, and that therefore this claim was not involved in his appeal. This unsound argument has been disposed of under Point II above. The fact of the matter is, however, that even if it were to be conceded, *arguendo*, that he did so, what about his claim to be a minister? The Board did not even review the information in the file on that claim.

The Court states that to require the Appeal Board to examine the entire file would be placing "a burden upon such a board never intended by the Act or Regulations and entirely inconsistent with the natural exigencies which said Act and Regulations were intended to meet." (Transcript: Opinion, p. 10.)

The Court again falls into the error of drawing an analogy to judicial proceedings where the transcript of record of a proceeding before the lower Court may have involved days of trial, with a voluminous record. The hearings before the local boards, however, are only a matter of a few hours at most (here there was no hearing); and the transcripts are quite simple, consisting at most of the questionnaire and written summary of facts and other documents in the file. One has only to look at the transcript in this case to see how simple it is.

A similar argument made in the *Estep* case, supra, a criminal prosecution for refusal to submit to induction into the armed forces, was rejected by the Supreme Court, Mr. Justice Murphy, in a concurring opinion, stating at pages 444, 432:

“It is urged that the purpose and scheme of the legislative program necessitates the foreclosure of a full hearing in a criminal proceeding under Section 11. The urgent need of mobilizing the manpower of the nation for emergency purposes and the dire consequences of delay in that process are emphasized. \* \* \* This is at best a poor excuse for stripping petitioners of their rights to due process of law. \* \* \* Adherence to due process of law in criminal trials is unlikely to impede the war effort unduly.

“We must be cognizant of the fact that we are dealing here with a legislative measure born of the cataclysm of war, which necessitates many temporary restrictions on personal liberty and freedom. But the war is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion and with a sense of proportionate values.”

The Court in *United States ex rel. Bayly v. Reckord*, supra, said at page 515:

“It is to be appreciated that these local boards are performing a highly important public service without compensation and are entitled generally to credit and appreciation of the public for their cheerful performance and uncompensated public service. They are, however, not above the law, and like other public officers, must comply with it.”

It is respectfully submitted that both the local and appeal boards here violated the most elementary and fundamental concepts of due process of law, which cannot be justified by any appeal to patriotism or wartime exigencies, and that Cox was denied his right to a serious and adequate consideration of his appeal by the appeal board's refusal to review the whole record and reclassify him *de novo*, and its dismissal of his appeal upon the basis of a statement made in his notice with which it disagreed.

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#### POINT IV.

**COX DID NOT AT ANY TIME SUBSEQUENT TO THE ACTION OF THE APPEAL BOARD WAIVE THE INVALIDITY OF THE INDUCTION ORDER.**

A registrant may at any time urge the constitutional invalidity of an induction order, since "Before a person may be punished for violating an administrative order, due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights." *Estep and Smith v. United States*, *supra*, at page 126.

It is only an irregularity in the induction proceeding itself, such as in the taking of the oath, which may be waived. The two Fifth Circuit Court decisions cited by the Court below illustrate this distinction. In neither *Mayborn v. Heflebower*, 145 Fed. (2d) 864, nor *Sanborn v. Callan*, 148 Fed. (2d) 376, were the induction orders attacked as arbitrary and

invalid and beyond the jurisdiction of the Board. Both registrants merely claimed that they had not been inducted into the Army because they had not taken the oath. Both relied on the Supreme Court decision in *Billings v. Truesdell*, 321 U.S. 542, 64 S.Ct. 737, which held that, as the Army and Selective Service Regulations stood in August, 1942, the actual induction which under Section 11 of the Act was a prerequisite to the right to try a selectee by court-martial for disobedience to an order, does not take place until he has taken the oath of induction.

The induction in these two cases, however, took place in 1943, when a new regulation was in effect. As the Court observed, this one was different from that considered in the *Billings* case (and that which existed at the time of Cox' alleged induction), since it specifically provided that "in the event of refusal to take the oath (or affirmation) of allegiance by a citizen, he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States." In these latter cases, the theory was that the oath was a mere formality; but back in 1942 when *Billings* and Cox reported for induction, it was a *sine qua non*, and so held by the Supreme Court in the *Billings* case.

It was also the law then that until a registrant had taken all the steps in the selective service process and had been finally accepted by the armed forces, he had not exhausted his administrative remedies so as to entitle him to judicial review of his classification. In *Falbo v. United States*, 320 U.S. 546, 64 S.Ct. 346, 88

L. Ed. 305, the Supreme Court held that a registrant could not defend a criminal prosecution under Section 11 of the Selective Service Act for refusing to submit to induction on the ground that he was wrongfully classified and was entitled to a statutory exemption, when the offense was a failure to report for induction into the armed forces or for work of national importance.

It was not until 1947, when the Supreme Court decided the *Estep* and *Smith* cases (*supra*) that the mere reporting for induction without being actually inducted was finally deemed sufficient, and that at that point a registrant exhausted his administrative remedies and could begin a judicial review. Thus, whether Cox took the oath or not (and his testimony that he did not was uncontradicted), it was still necessary for him to report to the induction center at San Francisco in order to exhaust his administrative remedies and thus to place himself in a position to seek a judicial review of his classification and purported induction. This he did. Moreover, he had the right to submit to induction rather than face criminal prosecution for disobeying the order. (*Ex parte Yost* (Southern Dist. of California, 1944), 55 Fed.Supp. 768; *affd.* 157 Fed.(2d) 44.)

As to the question of whether Cox took the oath, his testimony on this point was clear, and was the same kind of testimony that was given in other cases of this kind and accepted by the Courts. The Court below appears to believe that this testimony should have been corroborated in some way by Cox, and that his

“attempted corroboration” was insufficient, referring to his statement that he told the officer in charge that he had not taken the oath, that he telephoned his wife from Monterey and told her that he had not taken the oath, and that he told other persons the same thing. (R. 30-33, 35-36, 41, 74-75, 80-81, 82-83, 85, 104.)

Though this as well as the confirming testimony of his wife and the persons to whom he made these communications, and his subsequent conduct and trouble with his battery commander (R. 33-34, 74-75, 80-81, 82-83, 85, Pets. Exhibit No. 4) constitute ample corroboration, the fact is his testimony did not need to be corroborated to be believed. It was within the power of the Government to disprove the fact that he had not taken the oath by producing the officer in charge of the induction ceremony or Cox’ signature to the oath. The burden of proof was on it to show that he had become a member of the Army and subject to its military jurisdiction. It alone kept and controlled all the Army records. (*Vermehren v. Sirmeier*, 36 Fed. (2d) 876; *Givens v. Zerbst*, 225 U.S. 11, 41 S.Ct. 227, 65 L.Ed. 475.)

The rule with respect to the binding force on a Court of uncontradicted testimony is stated in 32 C.J.S., par. 1038, at page 1089:

“Uncontradicted or undisputed evidence should ordinarily be taken as true. More precisely, evidence which is not contradicted by positive testimony or circumstances and is not inherently improbable, incredible or unreasonable cannot be arbitrarily or capriciously discredited, disregard-

ed or rejected, even though the witness is a party in interest, and unless shown to be untrustworthy is to be taken as conclusive, and binding on the finding of fact. And when the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it.

The Court in the *Herman* case (*supra*, at page 734) has this to say on the same point:

“His contention that he neither verbally took the oath, nor in writing signed the oath, is supported by the failure of the Government to suggest anything to the Court except the petitioner’s unsatisfactory performance of small, simple non-combative duties \* \* \* which do not include any basic army training. If he had taken the oath, it would have been very easy to have proven. If he had signed the oath, equally quick and easy would have been that proof.”

The Court below appears to regard anything that Cox did under the compulsion of military authority after leaving the induction center as a waiver of “any irregularity in his induction.” If Cox did not take the oath, as he testified, then there was no induction at all and not just a mere irregularity. *Billings v. Truesdell*, *supra*. If he did take the oath, then he was still entitled to raise the question of the constitutional invalidity of the induction order. That was basic, and even an oath taken under the compulsion of such a void order and to exhaust his administrative remedies

as a condition precedent to his right to seek relief in the civil courts from that invalid order would not deprive him of the right to redress by habeas corpus at any time.

Assuming, *arguendo*, however, that this were not the rule, everything that Cox did after leaving the induction center at San Francisco was done under the compulsion of that invalid induction order. There was nothing voluntary about his movements at all. He was ordered by military authority to go from the Presidio in San Francisco to Monterey, and from there to Camp Rucker, and he was under no duty recognized by law to resist that asserted authority forcibly. (*United States ex rel. Filomio v. Powell*, *supra*, at page 186.)

All of this time Cox expected to get the hearing on his conscientious objector claim, which he had been promised all along the line, first by the secretary of his local draft board, who told him he would get a hearing in San Francisco; then in San Francisco, when he was told he would be given a hearing in Monterey; and then in Monterey, where he was told he would get such a hearing in Camp Rucker. (R. 30-33, 41-42, 102-103, 104.) At Camp Rucker he refused to take part in military training; and his letter to his wife of July 16, 1942 shows that he was still insisting that he was a conscientious objector, for he relates that he had "a showdown with the battery commander," and repeats a conversation with him wherein he stated that "any part of the service was helping to kill, whether you pulled a trigger or not". (Exhibit No. 4.)

Though this Court cannot see Cox, it may be pointed out that he is a very simple boy of limited education, much as was the registrant in *In re Herman*, 56 Fed. Supp. 733, 744, who was described by the Court there in words that fit Cox:

“He is simple and rather gentle in his refusals. He is courteous and essentially non-combative. He is not dogmatic nor assertive. He believes in working for a living. He does not believe in fighting. His reasoning is not logical, but he felt that so long as he was pressed into service he would perform that service so long as he did not take the oath or actually become a soldier, and so long as that service was not to fit him for a soldier but might be considered by himself as mere work. \* \* \* He is entitled, though it tests somewhat our judicial patience, to \* \* \* the full letter of the law. That full letter has been written by Congress and explained by the Supreme Court.”

The registrant in that case also refused to take the oath when he presented himself for induction, but was nevertheless placed in the Army and taken from California to Texas, when he, like Cox at Camp Rucker, “Half-heartedly participated in soldier activities.” (Page 734.) The Court, in granting the writ discharging the petitioner from military imprisonment, said at page 774:

“I seriously question whether, when one is forced by persuasion or by order or by Army social pressure, to engage in the simplicities that this man did, that he thereby takes himself out of the clear distinction that is made in the law. Until he is inducted he is liable to the civil authori-

ties. After he is inducted he is liable to the military authorities. Induction includes the taking of the oath.”

In both the *Callan* and *Mayborn* cases, *supra*, there were specific waivers of the irregularities in the induction proceeding. Callan, the day after the oath was administered, appeared before an officer and promised that he would fight for his country and make a good soldier. Mayborn at camp told his superior that he had changed his mind and would undertake his duties as a soldier, and for more than two months thereafter he saluted his officer and performed all duties required of him as a soldier.

There is nothing of that kind here. When Cox was put into a combat unit (Battery C, 317th Field Artillery) at Camp Rucker, he immediately advised the captain in command of the battery that he was a conscientious objector, had refused to take the oath, and was not a soldier. His captain argued with him in vain, and then compelled him to carry two heavy 2x4 timbers nailed together in lieu of a gun, both on the parade ground and on a bivouac. When he rebelled, Cox was thrown into a stockade. (R. 33-34.)

When Cox was released, his captain again tried to argue his convictions out of him; and when Cox remained firm, told him that he would transfer him into a medical unit, but Cox insisted that he was opposed to all military service, both combatant and non-combatant (see his statement in his Selective Service file), and that he would be helping them kill Germans then just as much as if he pulled a trigger. (R. 34.)

Cox then waited only long enough to draw his first and last pay check so as to have funds to buy a rail ticket home, and he then returned to his family in San Jose, where he has been steadily employed under his own name and social security number until arrested by the F.B.I. and imprisoned in the guard-house at the Presidio of San Francisco on May 3, 1949. (R. 38, 43.)

Moreover, the lower Court's "constructive induction" theory was demolished by the Supreme Court in the *Billings* case, *supra*. Though both the District and Circuit Courts held that Billings was constructively inducted because he had been furnished meals and lodgings by the Army, went to camp, etc., the Supreme Court held that such induction was invalid.

In *Gibson v. United States*, 329 U.S. 338, 91 L. Ed. 344, a similar theory of "forfeiture by acquiescence" was rejected by the Supreme Court in these words:

"The government does not urge that Gibson waived his rights by submitting to 'induction' in the sense of voluntarily surrendering them; it is rather that he acted at his peril in taking steps beyond those required to complete the administrative remedial processes, even though he mistakenly thought them necessary for that purpose. The argument is essentially one of forfeiture rather than of waiver. The facts would sustain no intention to submit to induction or to surrender any rights."

How can it be seriously argued that a man with such a record of continuous resistance to military

service waived the constitutional invalidity of the induction order? It is clear from all the facts that even if this were in his power, he did not do so.

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#### POINT V.

**EVEN IF APPELLANT HAD BEEN LEGALLY INDUCTED INTO THE ARMY AND HAD IN FACT DESERTED, HIS PROSECUTION BY A MILITARY COURT IS NOW BARRED BY STATUTE OF LIMITATION.**

The facts here are not in dispute. Cox left Camp Rucker on or about August 30, 1942, and was reported absent without leave on August 31st. He was continuously absent from the military jurisdiction until arrested and returned to the Presidio of San Francisco on May 3, 1949, nearly seven years later. The Army admittedly made no effort to find him during these seven years, though he lived with his family openly in San Jose, used his own name and social security number, and was steadily employed. (R. 43.) The lower Court took considerable pains to find out just why the Army was so dilatory, but there was no explanation; it simply did nothing whatever until April, 1949, when it referred the case to the F.B.I. (R. 173-74, 177.)

The Congress of the United States has seen fit to provide limitations for the prosecution of various criminal offenses, both in the Articles of War and the Federal Criminal Code. The Thirty-Ninth Article of War (10 U.S.C.A. Sec. 1510) places a two-year limitation on the prosecution of all military offenses except desertion in time of war and three other offenses,

and as to these—or any others not enumerated—it provides that “This Article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.” The bar created by existing law is equally clear, and is contained in Title 18, Section 3282 U.S.C.A., the Federal Criminal Code:

“No person shall be prosecuted or punished for any offense not capital unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.”

The only exception to the three-year limitation otherwise provided is contained in Section 3290 following, relating to “any person fleeing from justice”. The limitation of prosecution set forth above is so binding that not even an aggravated case of treason could be prosecuted after three years, until the Eighty-first Congress by special statute extended the time within which such a prosecution could be instituted. The appellee does not contend that Cox was a fugitive from justice, but says that there is no limitation for punishment of desertion in time of war. But the Thirty-Ninth Article of War does not so provide; it is silent on the specific question, and instead recognizes the limitations on prosecution provided by “other existing law”.

It is settled law that where a Congressional statute does not contain a specific limitation for the prosecution of any offense, the three-year limitation provided

in the Federal Criminal Code must prevail. *United States v. Krepper* (1946), 159 Fed. (2d) 958, 965.

The Articles of War are not made by the military; they are made and amended by the same Congress that has established the foregoing limitation of prosecution as the law of the land. There is no exception, either express or implied, of the offense of desertion from this bar. As stated by this very Circuit Court in *in re Zimmerman*, 30 Fed. 176, 179:

“If this offense can be taken out of the statute, so may any and all others, and the statute be wholly abrogated and rendered nugatory, by what seems to be a manifestly unjustifiable ruling of the Secretary of War and by courts-martial, if followed by them, acting in deference or subordination thereto.

“A question has arisen, whether desertion is a *continuing* offense, in such sense that the statute does not begin to run till the expiration of the term of the enlistment. A continuing civil or military obligation to serve till the expiration of the term of enlistment is *one* thing; and a continuing criminal offense, if such there can be, which is perfected and ripe for charges and trial at the moment it is ‘committed’, for the purpose of barring trial and punishment under the Statute of Limitations, is quite another.”

Here appellee cannot well claim that the alleged offense is not subject to the statute because of a “continuing nature”, since it has already tried and convicted the appellant by court-martial on the charge that he deserted on August 31, 1942. He committed

the alleged offense then, if at all, and he could have been taken and brought to trial at any time within three years thereafter. A similar question was raised in *United States v. Salberg*, 287 Fed. 208, 209, where the Court said:

“The offense charged, as well as the offense committed, is not a continuing offense. The indictment was not found until December 20, 1922. Prosecution of the offense was barred not later than June, 1920.”

See also *Warren v. United States*, 199 Fed. 753, 43 L.R.A. n.s. 278, for the analogous “continuing offense” of concealing bankrupt assets.

The district judge himself expressed his opinion that “There certainly should come a time when the person is free of the possibility of arrest, even if he is a deserter.” (R. 177.) The appellant’s argument that there is no such limitation was demolished by an early decision, *In re Davidson*, 4 Fed. 507, where the Court said:

“It is certainly a startling proposition that there is no limitation at all upon prosecution for the offense of desertion; that one who has once been a deserter is subject during the whole of his natural life to be brought before a military court and tried and punished for this offense, even in extreme old age. Yet this is seriously contended by the learned counsel for the respondent \* \* \* The statute does not require, nor in my opinion admit of so strict and narrow a construction \* \* \* As it is the only Article (of War) limiting the time of prosecution, the presumption

is very strong that it extends to every military offense; for, with the single exception of the crime of murder, the almost universal policy of the criminal law is to prescribe a term within which the offender shall be brought to trial. The language of this statute of limitations must be construed with reference to the use of similar language in other statutes of limitations \* \* \* *Nor, as it seems to me, can the whole effect of this limitation be taken away on the theory that the desertion may be considered for some purposes to be a continuing offense. The offense was completed February 22, 1878, for the purposes of this Article, and indeed, in the writ that is alleged to be the time when the offense was committed for which the prisoner is now held.*" (Italics supplied.)

On the now wholly untenable ground that "a military prisoner cannot avail himself of habeas corpus", the Circuit Court reversed the *Davison* case, but it refused to pass on the issue so strongly presented by the District Court.

The sound reasons of public policy mentioned by the Court in the *Davison* case as requiring a limitation of time for the prosecution of criminal offenses is further emphasized in *United States v. Eliopoulos*, 45 Fed. Supp. 777:

"Statutes of limitation are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government, to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability."

The need for such protection is amply illustrated in the instant case, where by lapse of time and changes of residence appellant's wife testified that all of appellant's daily letters to her from the Army camps where he was detained, with the sole exception of one complete letter and the fragment of another, had been lost. Yet those letters detailed in a manner that cannot be provided by any other evidence the continuous daily resistance of Cox to his impressment into military service despite his conscientious objections to war.

But appellee contended below that even if appellant's prosecution be now barred by statute, that defense can only be raised in the military court. (R. 176.) Admittedly, if the prosecution be now barred, the military court has no jurisdiction to try appellant. That primary question of jurisdictional fact is reviewable in the civil courts. The great Justice Brewer of the United States Supreme Court answered appellee's contention completely in *Grimley v. United States*, 137 U.S. 147, 150, 11 S. Ct. 54, 34 L. Ed. 636:

“It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from sentence.”

Mr. Justice Brewer's decision in the *Grimley* case was recently approved by the Supreme Court in *Brown v. Hiatt*, 339 U.S. 103, 94 L. Ed. 493, 70 S. Ct. 495.

This very question of the right of Federal Courts to inquire into the claimed jurisdiction of a military

court was thoroughly examined by the Circuit Court of Appeals in *Vermehren v. Sirmeyer*, supra, at page 380:

“A court-martial is a tribunal of special and limited jurisdiction. Its judgments are open to collateral attack so far as questions relating to its jurisdiction are concerned. *McLaughry v. Deming*, 186 U.S. 49, 22 S. Ct. 186, 46 L. Ed. 1049; *Givens v. Zerbst*, 255 U.S. 11, 41 S. Ct. 227, 65 L. Ed. 475; *Collins v. McDonald*, 258 U.S. 416, 42 S. Ct. 326, 66 L. Ed. 692.

“The burden is upon the party asserting the validity of the judgment of the court-martial to prove the existence of the necessary jurisdictional facts. *Givens v. Zerbst*, supra, page 19.”

Not only did appellee fail at the hearing below to adduce any proof whatsoever as to the disputed jurisdiction of the military court in this respect, but in his return to the writ of habeas corpus (Transcript, p. 4) he admits, and is bound by that admission, “That on or about August 31, 1942, the petitioner herein, while stationed at Camp Rucker, Alabama, deserted from the Army of the United States \* \* \*”

The prosecution of appellant was therefore barred by the statute of limitation contained in the Federal Criminal Code, Section 3282, as the “existing law” other than the Articles of War, on and after September 1, 1945.

**CONCLUSION.**

Since appellant was denied due process of law by his local board as well as by his appeal board, rendering the induction order a nullity; since he did not abandon his claim to be classified as a conscientious objector as provided by law, nor thereafter waive the invalidity of the order of induction; and since his prosecution on this seven-year old charge is barred by the statute of limitations, the writ should be sustained and appellant discharged and the order of the lower Court reversed.

Dated, San Francisco, California,  
January 8, 1951.

Respectfully submitted,  
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